

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB**

Mailed: September 8, 2004
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

R.C.S. Periodici S.P.A.
v.
Max H. Schwartz

Opposition No. 91110915
to application Serial No. 75348849
filed on August 28, 1997

Request for Reconsideration

Frank P. Presta of Nixon & Vanderhye P.C. for R.C.S.
Periodici S.P.A.

Todd E. Stockwell of Stockwell & Associates for Max H.
Schwartz.

Before Simms, Quinn and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

The Board, in a decision issued May 13, 2004,
sustained the opposition of R.C.S. Periodici S.p.A. to Max
H. Schwartz' application to register the mark MAX MAGAZINE
and design for a "magazine expressly for readers over thirty
years of age featuring topics about their lifestyles and on
medicine, health, exercise and diet." The Board found that

Opposition No. 91110915

applicant's mark MAX MAGAZINE and design for the identified goods was likely to cause confusion with opposer's previously used and registered mark MAX for "adult entertainment magazines."

Applicant has filed a timely request for reconsideration. In particular, applicant requests that the Board remand its application to the Examining Attorney in order to amend the identification of goods to: "magazine expressly for readers over thirty years of age featuring topics about their lifestyles and on medicine, health, exercise and diet, and distributed freely solely in free distribution publication areas of retail outlets."

Applicant argues that the proposed amendment restricts the channels of trade of its magazine and thereby eliminates the likelihood of confusion.

Opposer has filed a brief in opposition to applicant's request for reconsideration.

Although styled a request for reconsideration, applicant's request is essentially a motion to amend its application. Trademark Rule 2.133 provides that, once an opposition has commenced, the application which is the subject of the opposition may not be amended in substance, except with the consent of the other party and the approval of the Board, or except upon motion granted by the Board. Moreover, when a motion to amend an application is made

without the consent of the other party, it should ordinarily be made prior to trial in order to give the adverse party fair notice thereof. See TBMP §514.03 (2d ed. rev. 2004).

In this case, opposer has objected to applicant's proposed amendment and the amendment is clearly untimely since it was filed after final decision.

Under the circumstances, the request for reconsideration is denied.¹

¹ We should add that, even if applicant had timely filed a motion to amend, applicant's proposed amendment would not necessarily overcome the likelihood of confusion. As indicated in our decision, the question of likelihood of confusion must be determined on the basis of the goods as they are set forth in opposer's registration and applicant's application, and not in light of what such goods are shown or asserted to actually be. In view of the fact that opposer's registration contains no limitations as to the channels of trade, it must be presumed that opposer's adult entertainment magazines travel in all of the normal channels of trade, which could include retail outlets that have free distribution publication areas.